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Supreme Court of the United States

October Term 1968

No. 7

GEORGE SAMUELS, ABRAHAM C. TAYLOR, HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA McPHERSON, MAX STANFORD, MERLE STEWART, HAMPTON WOODWARD ROOKARD, URSULA VIRGINIA WEST and MILTON ELLIS,

Plaintiffs-Appellants.

v.

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendants-Appellees.

On Appeal From The United States District Court
For The Southern District of New York

APPELLANTS' REPLY BRIEF

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March 24, 1969

SUPREME COURT OF THE UNITED STATES

October Term, 1968
No. 580

GEORGE SAMUELS, ABRAHAM C. TAYLOR, HERMAN BENJAMIN FERGUSON, ARTHUR HARRIS, MANDOLA McPHERSON, MAX STANFORD, MERLE STEWART, HAMPTON WOODWARD ROOKARD, URSULA VIRGINIA WEST and MILTON ELLIS,

Plaintiffs-Appellants,

v.

THOMAS J. MACKELL, District Attorney of Queens County, and LOUIS J. LEFKOWITZ, Attorney General of the State of New York,

Defendants-Appellees.

APPELLANTS' REPLY BRIEF

I

The decision of the Court last week in *Shuttlesworth* v. *City of Birmingham*, ___U.S.___ 37 U.S.L. Week 4203 (March 11, 1969) is dispositive of this case. There, the Alabama Supreme Court had narrowly construed an obviously overbroad City ordinance in an attempt to render it constitutional. This Court stated:

> "It would have taken extraordinary clairvoyance for anyone to perceive that this language [of the City ordinance] meant what the Supreme Court of Alabama was destined to find that it meant more than four years later; and, with First Amendment rights hanging

> in the balance, we would hesitate long before assuming that either the members of the Commission or the petitioner possessed any such clairvoyance at the time of the Good Friday march." (37 L.W. at 4205-4206.)

In *Shuttlesworth* this Court held that:

> "If these [state] officials construe a vague statute unconstitutionally, the citizen may take them at their word, and act on the assumption that the statute is void." Harlan, J., concurring at 37 L.W. at 4206.

If this is true as to administrative officials, certainly it is true where, as here, the vague statute has been construed unconstitutionally by the highest court of the state. If Shuttlesworth had the right to rely on an unconstitutional construction of the statute by Commissioner Connor of Birmingham, appellants certainly had the same right to rely on a similar construction of the Criminal Anarchy Law by the New York Court of Appeals. Indeed, they had much greater reason for reliance, because the statute was not, as in *Shuttlesworth*, one which was previously uninterpreted; it was a totally unforeseeable reinterpretation of a concededly unconstitutional statute.

It is quite immaterial, as appellee Mackell argues (Br. pp. 37-38), that *Epton* was decided before the indictment herein was returned. The *acts* alleged in the indictment occurred before the decision in *Epton* was rendered,[1] and appellants did not have "extraordinary clairvoyance." As Juctices Black and Douglas stated, concurring in *Gregory* v. *City of Chicago*, ___U.S.___ 37 U.S.L. Week 4213 (March 11, 1969):

> "The infringement on First Amendment rights will not be cured if the narrowing construction is so unforeseeable that men of common intelligence could not have

1. The *Epton* decision was on May 16, 1967; the acts alleged in the indictment were all before that date.

realized the law's limited scope at the only relevant time, when their acts were committed. . . ." (37 L.W. at 4216.)

It is difficult to understand appellee Mackell's argument (Br. p. 25) that there can be no chilling effect in the instant case "because the statutes upon which the indictment was found had been repealed." The Criminal Anarchy Law was repealed effective September 1, 1967, but it still applied to the conduct allegedly engaged in by the appellants, all of which occurred prior to September 1, 1967. Furthermore, the new Criminal Anarchy Law (Penal Law §240.15) is as vague and overbroad as its predecessor, and has precisely the same chilling effect.

II

People v. *Gitlow*, 234 N.Y. 132, 138, interpreted the phrase "organized government" (§§160 and 161 of the Criminal Anarchy Law) to mean "all organized government in this country, whether it be that of the city, state or nation". *People* v. *Epton*, 19 N.Y. 2d 496, 507, by defining "organized government" to mean "activity directed against a state or local government" has thus redefined a term of the statute in an attempt to conform to constitutional requirements. Even if such a reinterpretation were permissible, appellee Mackell is incorrect in asserting (Br. pp. 38-39) that the statute can thus not "collide with any act of Congress prohibiting sedition against the Federal Government", for the Smith Act explicitly covers sedition directed against a state, as well as against the Federal Government.

III

The appellee Mackell refers (Br. p. 4) to the fact that the murder of civil rights leaders was planned, and that gasoline and drums of oil were to be placed at strategic locations and set aflame in event of a riot. These facts are nowhere in the record. Even assuming them to be true, it cannot be conceived how such acts constituted a "clear and present danger" that the government of the State of New York and its subdivisions would be overthrown; at most it is conspiracy to commit murder and conspiracy to riot.

Appellee states (Br. p. 32) that the indictment is not aimed at "discussion or publication, but rather at the accumulation of an arsenal for the purpose of overthrowing state and local government" and that the appellants were engaged in "hard core activities" (Br. p. 38). This does not appear from the indictment. The overt acts listed therein (R. 14a-19a) allege mostly acts relating to discussion. There are both generalized and specific allegations of "force and violence," but no more "hard core" than in any other sedition case.

Appellee's constant references (Br. pp. 5, 32-33, 40) to those provisions of the indictment relating to possession of weapons serve to emphasize that the State has ample power to prosecute persons without the need to resort to the Criminal Anarchy Law.

Forty-one counts of the indictment charge illegal possession of weapons in violation of §1897, subd. 2, 3 and 9, conviction of which is, under certain circumstances, punishable as a felony with imprisonment up to seven years. The State is fully protected if the appellants are prosecuted for any violations of this statute that they may have committed.

CONCLUSION

The judgment of the court below should be reversed and the court directed to issue a declaratory judgment that former §§160, 161 and 163 are unconstitutional and to enjoin any prosecution of the plaintiffs under these sections.

Respectfully submitted,

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